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EXAMINER

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/396,888
Filing Date: September 16, 1999
Appellant(s): RIVAS ET AL.

James C. Wray
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 07/02/2007 appealing from the Office action mailed 06/02/2006.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments

The appellant's statement of the status of amendments after non-final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

WITHDRAWN REJECTIONS

The following grounds of rejection are not presented for review on appeal because they have been withdrawn by the examiner.

Upon further review of the arguments presented in the Appeal Brief with regard to the 112 first and second paragraph rejection on claims 7, 2-4, 8-10, 16 and 31, it's deemed applicant's argument is persuasive by the Examiner and therefore the 112 rejection imposed upon claims 7, 2-4, 8-10, 16 and 31 have been withdrawn.

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(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

6,123,661	FUKUSHIMA et al	09-2000
5,359,444	PIOSENKA et al	10-1994
5,813,990	RYLL	09-1998
5,431,170	MATHEWS	07-1995

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims

(rejection applied to claim 31 is presented as new ground of rejection):

Claim Rejections - 35 USC § 102

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

2. Claims 30, 31 and 37 are rejected under 35 U.S.C. 102(e) as being anticipated by Fukushima et al., U. S. Patent No. 6,123,661.

Regarding claim 30, Fukushima et al., (herein, Fukushima) discloses a pair of eyeglasses (display device -14) that include a plurality of infrared LEDs and

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photosensors (14f/14g - col. 5, lines 12-15 and figure 1), which reads on a pair of glasses, a plurality of light emitting diodes, and a plurality of photosensors, and the electrical circuitry is inherent as evident by the function of the eyeglasses in respect to the function of the LEDs and sensors and a power source (col. 6, lines 12-15).

Regarding claim 31, the plurality of photosensors (14g) are positioned in a plane offset from the plane of light emission from the light emitting diodes (LEDs 14f) as shown in Fig. 1. The vertical plane of light emission from the LEDs 14f is clearly offset or different from the vertical plane that the photosensors 14g are positioned.

Regarding claim 37, Fukushima et al., (herein, Fukushima) discloses a pair of eyeglasses (display device -14) that include a plurality of infrared LEDs and photosensors (14f/14g - col. 5. lines 12-15 and figure 1), which reads on a pair of glasses, a plurality of light emitting diodes, and a plurality of photosensors, and the electrical circuitry is inherent as evident by the function of the eyeglasses in respect to the function of the LEDs and sensors and a power source (col. 6, lines 12-15), and Fukushima further disclose the determining changes in the amount of reflected light received by the photosensors, wherein a user pulse rate is determined (col. 8, lines 52-67, and col. 9, lines 1-4).

Claim Rejections- 35 USC § 103

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and

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the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 32 is rejected under 35 U.S.C. 103(a) as being unpatentable over Fukushima view of Piosenka et al., U. S. Patent No. 5,359,444.

Regarding claim 32, Fukushima discloses everything claimed as applied above (see claim 30). Fukushima obviously discloses a form of signal transmission from the glasses to the controller 12 via the photosensor signal processing section (26 - figure 1). However, Fukushima fails to disclose the eyeglasses having a transmitter coupled thereto to correspond with a remote receiver.

Regarding the transmitter, Piosenka et al, discloses a pair of eyeglasses with a transmitter (65) that is used with a receiver and computer (col. 5, lines 10-56). It would have been obvious to one of the ordinary skill in the art at the time the invention was made to modify the invention of Fukushima by implementing a transmitter for the purpose of improving the use glasses for transmitting data relating the person's body functions.

5. Claims 33-34 and 36 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fukushima view of Ryll, U. S. Patent No. 5,813,990.

Regarding claims 33-34, Fukushima discloses everything claimed as applied above (see claim 30). Fukushima eyeglasses consist of a display. However, Fukushima's display or eyeglass fails to provide the sensed condition of the user.

Ryll disclose a pair of sport goggles that provides real time body monitoring information to user, wherein the information includes the heart rate of the user, which constitutes as a pair of eyeglasses for monitoring heart conditions (figure 1 and abstract). Ryll discloses display (48) in respect to figure 8 that provides a display which may be used in sports goggles for indicated a sensed condition, including a numerical display of the user's heart rate and pulse (col. 6, lines 61-67 and col. 7, lines 1-41). Thus, it would have been obvious to one of the ordinary skill in the art at the time the invention was made to modify the invention of Fukushima by providing a display the capabilities of display sensed results to the user for the enabling user to be aware of body functions.

Regarding claim 36, Fukushima discloses everything claimed as applied above (see claim 30). Fukushima eyeglasses consist of a power source. However, Fukushima fails to provide the power supply as a battery or solar cells.

Ryll further discloses a battery (42), which constitutes a power supply. Thus, it would have been obvious to one of the ordinary skill in the art at the time the invention was made to modify the invention of Fukushima by providing a battery for supplying adequate power to the glasses, wherein batteries are commonly known and used source of power supply.

6. Claim 35 is rejected under 35 U.S.C. 103(a) as being unpatentable over Fukushima view of Mathews, U. S. Patent No. 5,431,170.

Regarding claim 35, Fukushima discloses everything claimed as applied above (see claim 30). Fukushima eyeglasses fail to disclose on button for user input information. Regarding the button for user input information, Mathews further discloses mean of inputting preset data of the user to be used for comparing the sensed condition (col. 4, lines 4- 54).

It would have been obvious to one of the ordinary skill in the art at the time the invention was made to modify the invention of Fukushima by providing a means of inputting preset data of the user to be used for comparing the sensed condition, providing optimal monitoring techniques of the user's body functions.

Allowable Subject Matter

7. Claims 2-4, 6-27 and 29 are allowed.

(10) Response to Argument

Appellant's arguments filed 07/02/2007 have been fully considered but they are not persuasive.

Regarding claim 31, appellant's argument in regard to the 112th rejection has been considered and deemed persuasive, therefore, the 112th rejection previously presented in non-final rejection of 06/02/2006 have been withdrawn. However, upon further consideration of the Fukushima reference, it is clear that the photosensors 14g and the LEDs 14f as shown in Fig. 1 of Fukushima are in offset planes (each of vertical

planes for the photosensors and LEDs, for example, is offset from each other).

Therefore, the claimed limitation in claim 31 is met by the Fukushima reference and is rejected as indicated in the rejection above.

The appellant's argument are essentially directed to the prior art reference, Fukushima et al., not teaching a heart monitoring apparatus. The limitation of the heart monitoring apparatus is recited in the preamble of the claim. The explicit language of a heart monitoring apparatus is not recited in the claim language of independent claims 30 and 37. The claim language of claim 37, merely recites emitting light onto a surface of user, wherein the term "surface" provides for a broad interpretation. The claims language of the claim have been examined and rejected in respect to the broadest interpretation. Fukushima is not exclusively limited to a heart monitor apparatus, but, the Fukushima reference does provide support and teachings of heart rate calculations and/or monitoring, pulse rate monitoring (col. 5, lines 6-11, col. 8, lines 52-67-col. 9, lines 1-7), which is synonymous to heart rate. And in respect the claim language, Fukushima et al anticipated the claimed inventions (figure 1), with a pair of eyeglasses (display device-14) with a plurality of photosensors and LEDs, inherent electronic circuitry as evident of the function of the eyeglasses or display device, and a power source (col. 6, line 13), therein as claimed (claim 30); and claim 37 further includes a change in the light emission of the LED in respect to the change of user's condition, all indicated in the above office action (see Fukushima, col. 8, lines 52-67, and col. 9, lines 1-4).

In response to the appellant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

Regarding the argument of the dependent claims, for claim 32, figure 1 provides obvious support of a transmission means to a remote device, however, the Piosenka reference (see col. 5, lines 10-56) has been provided to clearly indicate that it was well known in the art for a pair of eyeglasses to include a transmitter that transmit human data information to a remote device. Other dependent claims (33-36) are rejected under obviousness, wherein the claimed limitation are supported in a similar art teachings or common knowledge/awareness, and would have been obvious to one of ordinary to modify the teachings offered by Fukushima.

In respect to claim 33 and claim 34, the appellant argues that Fukushima does not indicate a sense condition to the user, the examiner indicates in the rejection that Fukushima fails to disclose the limitation, and introduces a secondary reference Ryll, which includes related context, and provides support for claimed limitation (col. 6, lines 61-67 and 7, lines 1-41). The two reference a relevant reference because both are directed to monitoring a persons body functions.

Regard claim 36, the appellant argues that the combinations of Fukushima and Ryll not disclosing a power source consisting of batteries or solar cells, and combinations thereof; and no motivation to combine. As indicated in the office action, Fukushima does not disclose the type of power source. The use of various types of power sources are well known and are used in various same size devices, thus making obvious to one of the ordinary skill to modify Fukushima.

Regarding claim 35, the appellant argues Mathews, which is used to modify Fukushima to implement a button to enter user's information on the glasses has nothing to do with Fukushima and provide no motivation to combine. The Mathews reference provides such known teachings of the claimed limitation (col. 4, lines 4-54).

Furthermore, in response to appellant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

As these are the totality of arguments presented, and they have been found unpersuasive, the existing rejection is deemed appropriate.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

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For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,


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